

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

## BENCHMARK INSURANCE COMPANY,

**Plaintiff,**

VS.

## GL CONSTRUCTION COMPANY et al.,

### Defendants.

3:14-cv-00326-RCJ-VPC

## ORDER

This case arises from an insurance dispute. Defendant GL Construction Company and its owner, Defendant Gordon Lemich, were sued in state court by Defendants Cerberus Holdings, LLC (“Cerberus”) and Northern Nevada Homes, LLC (“NNH”) for wanton and intentional trespass arising from GL’s dumping of dirt and other debris on property owned by NNH (“the *Cerberus Action*”). During time relevant to that case, GL held a general commercial insurance policy (“the Policy”) from Plaintiff Benchmark Insurance Company (“Benchmark”). GL tendered a claim for coverage under the Policy, which Benchmark denied. Benchmark then sued Defendants for a declaratory judgment that it owed GL no coverage for Cerberus’s and NNH’s allegations.

The Court recently granted Benchmark’s motion for summary judgment on the issue of whether it owed a duty to defend GL in the *Cerberus* Action. (ECF No. 90). This ruling came after the Court had denied GL and Lemich’s motion for summary judgment on the same issue,

1 (ECF No. 36), as well as at least two subsequent motions for reconsideration, (ECF Nos. 56, 69).  
2 Now pending before the Court is a Motion for Reconsideration filed by Cerberus and NNH.  
3 (ECF No. 93). Cerberus and NNH claim as the basis of this Motion that recently taken  
4 deposition testimony demonstrates that three separate acts of dumping or trespassing occurred on  
5 the property at issue. Cerberus and NNH argue that even if the Policy's deemer provision  
6 precludes coverage as to the first act of dumping, which they call "cut and fill," the deemer  
7 provision does not preclude coverage on a "stockpiling" of dirt that occurred in 2011-2013, or a  
8 third instance of trespass that occurred in 2009. (Mot. for Recon. 4-8, ECF No. 93).

9 A motion to reconsider must set forth "some valid reason why the court should reconsider  
10 its prior decision" and set "forth facts or law of a strongly convincing nature to persuade the  
11 court to reverse its prior decision." *Frasure v. United States*, 256 F. Supp. 2d 1180, 1183 (D.  
12 Nev. 2003). Reconsideration is appropriate if this Court "(1) is presented with newly discovered  
13 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is  
14 an intervening change in controlling law." *Sch. Dist. No. 1J v. Acands, Inc.*, 5 F.3d 1255, 1263  
15 (9th Cir. 1993). "A motion for reconsideration is not an avenue to re-litigate the same issues and  
16 arguments upon which the court already has ruled." *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp.  
17 2d 1280, 1288 (D. Nev. 2005).

18 The Court finds that reconsideration is not warranted here. Cerberus and NNH's Motion  
19 is brought under a theory of newly discovered evidence in the form of the deposition testimony  
20 cited above. Evidence, however, is not considered newly discovered simply because an  
21 opposing party did not have the evidence prior to the order being challenged. Rather, the party  
22 asserting additional evidence "must show that he failed to discover that evidence earlier although  
23 he exercised due diligence." *Moylan v. Siciliano*, 292 F.2d 704, 705 (9th Cir. 1961). Cerberus  
24

1 and NNH offer no persuasive explanation as to why they could not have obtained the depositions  
2 of Lemich, Fitzgerald, or any other party related to this case prior to the Court's April 13, 2015  
3 order. Indeed, the Court first ruled on the issue of Benchmark's duty to defend GL in the  
4 *Cerberus* Action back in October 2014. There is no reason why Cerberus and NNH could not  
5 have deposed Lemich after that ruling, or even after the Court's denial of the first motion for  
6 reconsideration in January 2015, to determine whether GL's dumping was continuous or could  
7 somehow be divided into different "types" of dumping as is now alleged. For this reason alone,  
8 reconsideration is not proper.

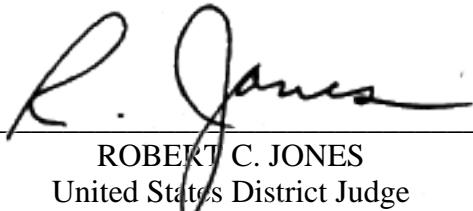
9 Furthermore, the Court finds that even if the "newly" discovered evidence were properly  
10 presented now, it would have no effect on the outcome of this case. The deposition testimony  
11 does not convince the Court that GL's dumping should be divided into separate instances as  
12 Cerberus and NNH suggest. The harm alleged in the *Cerberus* Action is damage caused by GL's  
13 dumping regardless of the purpose or objective of that dumping. The Motion to Reconsider is  
14 denied.

15 **CONCLUSION**

16 IT IS HEREBY ORDERED that Cerberus and NNH's Motion for Reconsideration (ECF  
17 No. 93) is DENIED.

18 IT IS SO ORDERED.

19  
20 Dated: June 1, 2015

21   
22 ROBERT C. JONES  
23 United States District Judge  
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